

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WESTPORT INSURANCE
CORPORATION,

Plaintiff,

v.

THE MARKHAM GROUP, INC.,
P.S., MARK KAMITOMO, and
RACHEL NAIDU, Individually and
as Personal Representation of the
ESTATE of JAMES L. OVERCASH,

Defendants.

NO. CV-08-221-RHW

**ORDER GRANTING
PLAINTIFF'S MOTION TO
DISMISS COUNTERCLAIM**

Before the Court is Plaintiff's Motion to Dismiss Counterclaim (Ct. Rec. 53). The motion was heard without oral argument.

In this action, Plaintiff Westport Insurance Corporation filed a declaratory action seeking to have this Court declare that it does not have a duty to defend or indemnify the Markham Group, Inc., P.S. and Mark Kamitomo in connection with an alleged legal malpractice claim of Rachael Naidu. Plaintiff named as a defendant Ms. Naidu, individually and as personal representative of the Estate of James L. Overcash.

In her answer, Ms. Naidu asserted a counterclaim for reasonable attorneys fees. Plaintiff moves to dismiss this counterclaim, arguing that a third-party claimant has no right of action against an insurance company for breach of the duty of good faith. The Court agrees.

**ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS
COUNTERCLAIM ~ 1**

1 Ms. Naidu's claim for attorneys fees is barred by *Tank v. State Farm Fire &*
2 *Cas. Co.*, 105 Wash.2d 381 (1986). Ms. Naidu had not alleged a non-*per se*
3 Consumer Protection Act claim. Defendant has not alleged that Plaintiff engaged
4 in unfair or deceptive acts that induced Ms. Naidu to act or refrain from acting, nor
5 could she, based on the Court's understanding of the facts of this case. The Court
6 does not find that Defendant was the intended beneficiary of the contract between
7 Plaintiff and Defendant Kamitomo. Finally, the Court declines to extend *Olympic*
8 *Steamship* to permit Ms. Naidu to recover her fees in this action. The Court
9 declines to permit Ms. Naidu leave to amend her complaint, given the posture of
10 this case.

11 Accordingly, **IT IS HEREBY ORDERED:**

12 1. Plaintiff's Motion to Dismiss (Ct. Rec. 53) is **GRANTED**.

13 2. Defendant Naidu's counterclaim for reasonable attorneys' fees is
14 **dismissed**, with prejudice.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
16 Order and to provide copies to counsel.

17 **DATED** this 6th day of November, 2009.

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19 *s/Robert H. Whaley*

20 ROBERT H. WHALEY
21 United States District Court
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